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IN THE
SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1996

No. 96-1936

FAIRPORT INTERNATIONAL
EXPLORATION, INC.,

Petitioner,

v.

THE SHIPWRECKED VESSEL KNOWN AS
THE *CAPTAIN LAWRENCE, in rem,*

Respondent.

STATE OF MICHIGAN,

Intervenor.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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MOTION OF COLUMBUS-AMERICA DISCOVERY GROUP FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITION

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MOTION OF COLUMBUS-AMERICA DISCOVERY GROUP FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITION

Columbus-America Discovery Group hereby moves, pursuant to Rule 37.2 of the Rules of this Court, for leave to file the attached brief as *amicus curiae*. Counsel for the Petitioner has consented to the filing of this brief; counsel for the Intervenor has refused consent.

As noted recently by the Ninth Circuit Court of Appeals, Columbus-America Discovery Group is a

multidisciplinary team of historians, engineers, scientists, and entrepreneurs dedicated to exploring the deep ocean. *Deep Sea Research Inc. v. The Brother Jonathan, et al.*, 102 F.3d 379, 382 n.1 (9th Cir. 1996), *cert. granted*, (U.S. June 9, 1997) (No. 96-1400). After performing historical research for more than a decade and searching an area the size of Rhode Island, Columbus-America located the SS *Central America*, a legendary Gold Rush steamship that sank in 1857 at a depth of 1⅓ miles, approximately 180 miles east of Charleston, South Carolina. The SS *Central America* was laden with gold and also carried approximately 600 passengers and crew members during its last voyage, yet only 153 of them lived to tell about how the once proud steamship succumbed to the fury of a tropical hurricane.

Since its discovery of the SS *Central America*, Columbus-America has used its robot -- *Nemo* -- to recover gold ingots and coins, other artifacts, and a wealth of historical and scientific information from the shipwreck site. Columbus-America has also devoted substantial resources to promoting the historical, scientific, and educational values of the SS *Central America*. For instance, the Group has produced two educational packages (in interactive laser-video disc format) for secondary schools, published a book on the history of the shipwreck, and created museum and zoo exhibits and other materials of interest to both the general public and the scientific community. Columbus-America has also supported an international Adjunct Science and Education Program, whose more than 100 participants from universities, museums, and research laboratories in this country and abroad have discovered a dozen new species of marine life and have researched such diverse areas as deep-sea site degradation mechanics and food chain processes.

The Group's accomplishments have been highlighted in numerous articles, including the March, 1992 *Life* article "The Greatest Treasure Ever Found" and the March, 1995 *Reader's Digest* article "Quest for the Ship of Gold." Noonan, *The Greatest Treasure Ever Found*, Life, Mar. 1992, at 32; *Quest for the Ship of Gold*, Reader's Digest, March 1995, at 202. The Group's qualities have also been described by various courts as follows:

- "What Thompson and Columbus-America have accomplished is, by any measure, extraordinary. We can say without hesitation that their story is a paradigm of American initiative, ingenuity, and determination."

  Columbus-America Discovery Group v. Atlantic Mutual Ins. Co, et al., 56 F.3d 556, 576 (4th Cir.), *cert. denied*, 116 S. Ct. 352 (1995).

- "In short, we cannot imagine anyone demonstrating more diligence, skill, and energy than Columbus-America has shown here. Its efforts provide a standard against which all others should be judged."

  Id. at 572.

- "Selection of the personnel to assist was from those most highly qualified and experienced in the contemplated activities. The same criteria was used in selecting the experts who were to evaluate, handle, care for and preserve the artifacts, scientific materials, information and knowledge obtained from the operation, and to preserve and make it available for future use by the public in research and learning."

Columbus-America Discovery Group v. Unidentified, Wrecked & Abandoned Sailing Vessel, Civ. A. No. 87-363-N, 1993 WL 580900, *6 (E.D. Va. Nov. 18, 1993), *aff'd*, 56 F.3d 556 (4th Cir.), *cert. denied*, 116 S. Ct. 352 (1995).

- "From the inception of the project, [Columbus-America] had assembled experts in the various fields of science, archeology, history, maritime, marketing and publicity, to advise and assist in the use, care and preservation of the shipwreck site....It is sufficient to say that they are the leaders in their field[s] of science and calling."

  Id. at *9.

Columbus-America does not have any affiliation whatever, financial or otherwise, with any of the parties in this case. It likewise does not have any monetary interest in the outcome of this matter. Columbus-America does, however, bring a unique perspective to this case because the issue of the standard for abandonment of sunken merchant shipwrecks is a fundamental, purely legal issue that is of paramount importance to scientists, entrepreneurs, and explorers who work not only in the United States, but also around the globe. Having found "an exceedingly small needle in a dauntingly large haystack" in international waters almost 200 miles off the eastern seaboard, *Columbus-America*, 56 F.3d at 572, Columbus-America offers an international vantage point that may help inform the Court's decision.

For these reasons, the Court should grant this motion for leave to file the attached brief *amicus curiae* in support of the petition.

Respectfully submitted,

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COLUMBUS-AMERICA DISCOVERY GROUP'S BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITION

STATEMENT OF INTEREST OF THE AMICUS CURIAE

On September 8, 1857, the luxury sidewheel steamer known as the SS *Central America* departed from the port in Havana headed for New York. On board were approximately 600 crew members and passengers from San

Francisco and several tons of gold coins and bars produced during the Gold Rush and its entrepreneurial aftermath.

Everyone on the SS *Central America* was headed straight into history, for soon after leaving Havana, the steamship sailed into the middle of a tropical hurricane. Despite valiant efforts to survive the storm, the ship went down on September 12, 1857, in roughly 8,000 feet of water, some 180 miles east of Charleston, South Carolina.

Approximately 130 years after this famous maritime disaster, Columbus-America Discovery Group's multidisciplinary team of historians, engineers, scientists, and entrepreneurs discovered the SS *Central America*. Since its discovery of the sidewheel steamship, Columbus-America has used its robot -- *Nemo* -- to recover gold, passenger trunks, other artifacts, and a wealth of historical and scientific information from the shipwreck site. Columbus-America has also devoted substantial resources to promoting the historical, scientific, and educational values of the SS *Central America*.

The Group's accomplishments have not gone unnoticed. They have received a great deal of attention from the admiralty bar and beyond, and the Fourth Circuit bestowed the following accolade on Columbus-America two years ago: "In short, we cannot imagine anyone demonstrating more diligence, skill, and energy than Columbus-America has shown here. Its efforts provide a standard against which all others should be judged." *Columbus-America Discovery Group v. Atlantic Mutual Ins. Co, et al.*, 56 F.3d 556, 572, *cert. denied*, 116 S. Ct. 352 (1995).

Columbus-America submits this brief in the hope

that it will assist the Court in addressing a fundamental legal issue that is of paramount importance to scientists, entrepreneurs, and explorers around the world. The issue pertains to the proper standard for determining whether a sunken merchant vessel is abandoned, and its resolution by the Court will help determine the future of exploration on the earth's last frontier.

STATEMENT OF THE CASE

Fairport International Exploration, Inc. filed an *in rem* complaint in admiralty against the *Captain Lawrence*, seeking the right to salvage the shipwrecked vessel, which sank in the waters of Lake Michigan in 1933. *Fairport International Exploration, Inc. v. The Shipwrecked Vessel Known as the Captain Lawrence, et al.*, 913 F. Supp. 552, 553 (W.D. Mich. 1995). The State of Michigan subsequently intervened to assert its claim of title to the shipwreck under the Abandoned Shipwreck Act of 1987 ("A.S.A."), 43 U.S.C. §§ 2101-2106 (1988), and to request that the case be dismissed because (i) the State had a colorable interest in the shipwreck, and (ii) Fairport International's action was a suit against the State prohibited by the Eleventh Amendment to the United States Constitution. *Fairport International*, 913 F. Supp at 553-54.

The District Court for the Western District of Michigan held that the State was required to prove by a "preponderance of the evidence" that the *Captain Lawrence* was actually abandoned. *Id.* at 554-55. Noting that the issue of abandonment was critical to the distribution of jurisdiction between state and federal courts, the district court reasoned that the standard for abandonment under the A.S.A. was consistent with the rule of inferred abandonment traditionally applied by

courts sitting in admiralty. *Id.*

The record in the *Captain Lawrence* case did not contain any evidence whatever that the vessel's owner had expressly renounced title or affirmatively disclaimed an interest in the shipwreck. *Id.* at 557. In fact, there was no evidence that anyone in the owner's chain of title had renounced ownership. Moreover, Fairport International claimed to be the successor-in-interest to the original owner. *Id.*

The district court nevertheless found that the *Captain Lawrence* had been abandoned. While the district court cited the Fourth Circuit's "express abandonment" standard in *Columbus-America Discovery Group v. Atlantic Mutual Ins. Co., et al.* 974 F.2d 450, 461-68 (4th Cir. 1992), *cert. denied*, 507 U.S. 1000 (1993), it applied the traditional, inferred abandonment rule, and concluded that "[t]he evidence, *although circumstantial*, clearly demonstrates [the owner's] intent to abandon the vessel." *Fairport International*, 913 F. Supp. at 558 (emphasis added). The district court's conclusion was based on the totality of the facts and circumstances, including the owner's failure to salvage the vessel, his failure to discuss the shipwreck with his family, the absence of documents leaving his interest to his heirs or anyone else, and his successors' failure to seek out potential salvors until they were approached and advised of available recovery equipment and potential salvage efforts.[1] *Id.* at 558-59.

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[1] Although the district court in the *Captain Lawrence* case suggested that the SS *Central America* case was factually distinguishable on grounds that technology to locate and recover the SS *Central America* had not existed prior to Columbus-America's efforts, *Fairport International*, 913 F. Supp. at 558, the district court that decided the SS

(continued...)

On January 30, 1997, the Sixth Circuit Court of Appeals affirmed the district court's decision in this case. *Fairport International Exploration, Inc. v. The Shipwrecked Vessel Known as the Captain Lawrence, in rem,* 105 F.3d 1078 (6th Cir. 1997). Fairport International had argued to the appellate court that the district court had "erred in determining that the vessel was abandoned because abandonment cannot be shown in the absence of strong and convincing evidence, such as an owner's express declaration of abandonment, and because the circumstantial evidence relied on was weak." *Id.* at 1083. The State of Michigan, in turn, had urged the Sixth Circuit not to adopt the Fourth Circuit's rule, and accordingly to reject the salvor's argument that abandonment could not be inferred based on circumstantial evidence. *Id.*

In a 3-0 opinion, the Sixth Circuit flatly rejected the "express abandonment" test and held that abandonment can be inferred. The appellate court affirmed the district court's conclusion that (i) "'[t]he evidence, although circumstantial, clearly demonstrates Wilfred Behrens' intent to abandon the vessel,'" *id.* at 1081, and (ii) the

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[1](...continued)
Central America case made no finding that the technology had not existed. That court, on the contrary, found that "even after scientific means of locating shipwrecks and possible recovery in deep water became known some twenty or more years prior to the actions of the plaintiff in th[at] case, still not one of the insurance companies undertook to locate or recover the Central America." *Columbus-America Discovery Group v. Unidentified, Wrecked & Abandoned Sailing Vessel*, 742 F. Supp. 1327, 1345 (E.D. Va. 1990). Moreover, the Fourth Circuit did not limit its express abandonment test to situations where the technology did not exist. *Columbus-America*, 974 F.2d at 464-67. There is no logical reason why this should have anything to do with the test, because the availability of technology is merely one of many factors to be considered under the "inferred abandonment" rule.

State of Michigan had thus "'met its burden of showing by a preponderance of the evidence that the *Captain Lawrence* was abandoned....'" *Id.* The Sixth Circuit summed up its decision to affirm by noting that "there is no question that the district court's finding of abandonment was not clearly erroneous, as there was an abundance of circumstantial evidence justifying an inference of abandonment." *Id.* at 1085.

In its opinion, the court below expressly noted that it was adopting the abandonment standard articulated by the Ninth Circuit last July in the *Brother Jonathan* case and was thus rejecting the "opposing view" expressed by the Fourth Circuit in the *Columbus-America* case. *Id.* The Sixth Circuit explicit stated that it was "follow[ing] the lead of *Brother Jonathan* rather than that of *Columbus-America*" because the reasoning in the *Brother Jonathan* case "accords with the vast majority of decisions that have discussed the [abandonment] issue." *Id.* at 1084-85.

In describing the proper test for abandonment, the Sixth Circuit quoted from the Ninth Circuit's recent decision:

> "Traditionally, maritime law has found abandonment when title to a vessel has been affirmatively renounced, or when circumstances give rise to an inference that the vessel has been abandoned; courts have found abandonment, for instance, when a vessel is 'so long lost that time can be presumed to have eroded any realistic claim of original title.' (citations omitted).
>
> * * *
>
> "[The district court's] holding that the

> Brother Jonathan is not abandoned rests on the traditional rule that a wreck is not abandoned unless either 1) title is affirmatively renounced or 2) abandonment can be inferred from the lapse of time or failure to pursue salvage effort on the part of the owners."

Id. at 1084 (quoting *Deep Sea Research, Inc. v. The Brother Jonathan, et al.*, 102 F.3d 379, 387-88 (9th Cir. 1996), *cert. granted*, (U.S. June 9, 1997) (No. 96-1400)).

In a diplomatic effort not to accentuate its fundamental disagreement with the Fourth Circuit, the Sixth Circuit observed that it did not need to engage in an in-depth analysis of the *Columbus-America* case because that case did not involve the A.S.A.:

> We find it unnecessary to undertake an analysis of whether the *Columbus-America* court correctly interpreted the laws of salvage and finds and their varying approaches to abandonment; we simply note that there is ample authority that abandonment may, for some purposes at least, be inferred from the surrounding circumstances.

Fairport International, 105 F.3d at 1085.

The Sixth Circuit reached this decision because of its conclusion that "common sense makes readily apparent that the [A.S.A.] did not contemplate a court's requiring express abandonment; such explicit action is obviously rare indeed, and application of such rule would render the ASA a virtual nullity." *Id.*

REASONS FOR GRANTING THE WRIT

The Court's attention is warranted to address the significant legal and practical consequences of the split among the federal circuits concerning the standard of abandonment applicable to maritime exploration and recovery.

Given the pendency of other cases raising similar issues, *see Deep Sea Research, Inc. v. The Brother Jonathan, et al.*, 102 F.3d 379 (9th Cir. 1996), *cert. granted*, (U.S. June 9, 1997) (No. 96-1400); *Bemis v. The RMS Lusitania*, 1996 U.S. App. LEXIS 24373 (4th Cir. Sept. 17, 1996), *petition for cert. docketed*, (March 14, 1997) (No. 96-1448), the Court's action here is certain to have critical effects on the emerging industry of high-technology maritime recovery. The disposition of this case also has important implications for state and federal management of historic shipwrecks under statutes governing "abandoned" maritime property. In short, this case is an appropriate vehicle for resolving a nationally and internationally important maritime issue.

I. THE COURT SHOULD RESOLVE THE CONFLICT AMONG THE CIRCUITS OVER THE TEST FOR DETERMINING WHETHER LONG-LOST SHIPWRECKS ARE ABANDONED.

A. Federal Circuits are in Direct Conflict Over the Test for Abandonment of Long-Lost Shipwrecks.

This case calls upon the Court to address the standard for finding abandonment of long-lost sunken

vessels. As noted by the court below, there are two conflicting views among the federal circuits on the standard for abandonment:

> The ASA itself does not define the term "abandoned," but two recent cases articulate the conflicting views on what is required to make an adequate showing. The first is *Brother Jonathan*, itself, decided after the district court decision in this case, but supporting its reasoning. A very different definition of "abandoned" is found in *Columbus-America* (citations omitted).

Fairport International, 105 F.3d at 1084.

As explained above, the Sixth Circuit declined to follow the "express abandonment" theory applied by the Fourth Circuit in the SS *Central America* case, and instead applied the rule of inferred abandonment.

The SS *Central America* case arrived at the Fourth Circuit after the District Court for the Eastern District of Virginia had an opportunity to consider the competing claims of Columbus-America and 39 insurance companies that had intervened to assert that they or their predecessors-in-interest had insured some of the gold aboard the SS *Central America* when it sank. *Columbus-America*, 974 F.2d at 455. The district court concluded that the shipwreck was abandoned because it could be inferred from the passage of time, the claimants' inaction, and all of the other relevant facts and circumstances that the insurance companies had abandoned any interest that they may have had in part of the steamship's cargo. *Columbus-America*, 742 F. Supp. at 1343-1348. The district court further found that much uninsured cargo was

aboard the vessel and there was no evidence that the gold recovered by Columbus-America was part of any insured shipment. *Id.* at 1347.

In a split 2-1 decision, the Fourth Circuit reversed, holding that although the hull and the passenger gold and effects on the ship were admittedly abandoned, the remainder of the cargo claimed by the insurance companies could not be considered abandoned unless Columbus-America proved by "clear and convincing evidence" that the insurance claimants had made an "express" abandonment. *Columbus-America*, 974 F.2d at 461, 464, 468. Because Columbus-America could not show that the insurance claimants had signed a formal document or made a public announcement disclaiming any interest that they may have had in the gold, the court of appeals reversed the district court's inference of abandonment and remanded the case for a determination of what share of the treasure each insurer would get under the law of salvage. *Id.* at 464-65, 468. In remanding, the court of appeals instructed that the recovered gold would belong in the first instance to the insurance companies to the extent of any insured shipment (despite the district court's finding that there was no evidence that the recovered gold came from any insured shipment), thus erecting a legal presumption that recovered items do not belong to an *in rem* plaintiff. *Id.* at 468.

Judge Widener dissented, criticizing the majority for "its principal holding that the district court's factual finding of abandonment was clearly erroneous; in applying the law of salvage to a long-lost wreck; [and] in making factual findings as an appellate court." *Id.* at 471 (Widener, J., dissenting). The dissent noted that the majority opinion's requirement of an express abandonment "c[ould] not be reconciled" with "the law of every other

circuit that has decided the question." *Id.* at 472, 477.

The Fourth Circuit split 7-5 in denying rehearing and rehearing *in banc*.[2] Prior to a final judgment in the remanded proceedings, Columbus-America unsuccessfully petitioned for certiorari on an interlocutory basis. *Columbus-America Discovery Group v. Atlantic Mutual Ins. Co, et al.*, 507 U.S. 1000 (1993).

The Ninth Circuit recently characterized the Fourth Circuit's requirement of "an express renunciation of ownership" to prove abandonment as "a significant modification [in] maritime law," thus highlighting the circuit split on the issue. *Deep Sea Research*, 102 F.3d at 388.

As noted above, in the *Brother Jonathan* case, the Ninth Circuit was confronted with the issue of when a shipwreck is deemed to be abandoned for purposes of the A.S.A. The State of California had argued in that case that the district court had "erred by adopting the Fourth Circuit's rule" in the *Columbus-America* case, "rather than relying on the traditional approach to abandonment which allows abandonment to be inferred on the basis of circumstantial evidence." *Id.* at 388.

The Ninth Circuit concluded in a unanimous decision, however, that even though the district court had cited the Fourth Circuit's decision in *Columbus-America*, it had not erred because it had not applied the Fourth Circuit's abandonment test -- but instead had correctly

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[2] Judge Hall, who had joined in the majority opinion, voted against a rehearing before the panel, but for consideration of the case by the full court *in banc*.

applied the traditional maritime rule:

> Although the district court in this case cites the Fourth Circuit's decision in *Columbus-America*, its holding that the *Brother Jonathan* is not abandoned rests on the traditional rule that a wreck is not abandoned unless either 1) title is affirmatively renounced *or* 2) abandonment can be inferred from the lapse of time or failure to pursue salvage efforts on the part of the owners....Thus, the State's argument that the district court applied the wrong test lacks merit.

Id. (emphasis added). The Ninth Circuit elaborated as follows:

> Traditionally, maritime law has found abandonment when title to a vessel has been affirmatively renounced, or when circumstances give rise to an inference that the vessel has been abandoned; courts have found abandonment, for instance, when a vessel is "so long lost that time can be presumed to have eroded any realistic claim of original title."

Id. at 387 (quoting *Martha's Vineyard Scuba Headquarters, Inc. v. Unidentified, Wrecked and Abandoned Steam Vessel*, 833 F.2d 1059, 1065 (1st Cir. 1987)).

The Sixth Circuit subsequently underscored the circuit split on the definition of abandonment when it specifically noted that it would "follow the lead of *Brother Jonathan* rather than that of *Columbus-America*." *Fairport*

International, 105 F.3d at 1085. In a diplomatic effort to avoid a head-on challenge to the Fourth Circuit's decision in *Columbus-America*, the Sixth Circuit stated that it did not need to directly reject that decision because it did not involve the A.S.A., but "simply note[d] that there is ample authority that abandonment may, for some purposes at least, be inferred from the surrounding circumstances." *Id.* The Sixth Circuit reached this decision because, as it commented, "[c]ommon sense makes readily apparent that the [A.S.A.] did not contemplate a court's requiring express abandonment: such explicit action is obviously rare indeed, and application of such a rule would render the ASA a virtual nullity." *Id.*

The decision of the Sixth and Ninth Circuits to apply the inferred abandonment rule is consistent with the legislative history of the A.S.A., which evidences Congress' intent to incorporate the traditional maritime meaning of abandonment into the statute. The text of the A.S.A., however, contains no definition of the term "abandoned." Accordingly, the statute must be assumed to have used abandonment as judicially defined in admiralty law. *See, e.g., Evans v. United States,* 504 U.S. 255, 260 (1992) (citing Frankfurter, *Some Reflections on the Reading of Statutes,* 47 Colum. L. Rev. 527, 537 (1947)).

The legislative history of the A.S.A. confirms that the traditional general maritime law standard of inferred abandonment was intended by Congress:

> The Committee notes that the term 'abandoned' does not require the original owner to actively disclaim title or ownership. The abandonment or relinquishment of ownership rights may be implied or otherwise inferred, as by an

> owner never asserting any control over or otherwise indicating his claim of possession of the shipwreck.

H.R. Rep. No. 514 (I) at 2, 100th Cong., 2d Sess. 1 (1988), *reprinted in* 1988 U.S.C.C.A.N. 365. *See Brother Jonathan*, 102 F.3d at 387; *Fairport International*, 105 F.3d at 1084.

Because the A.S.A. simply incorporates the traditional rule of abandonment rather than imposing a legislative definition, there is no logical reason why different standards of abandonment should be applied in A.S.A. cases as opposed to cases that do not involve that statute.

Significantly, there is a long line of pre-A.S.A. authority that the abandonment of sunken merchant vessels may be inferred. *See Martha's Vineyard Scuba Headquarters v. Unidentified, Wrecked and Abandoned Steam Vessel*, 833 F.2d 1059, 1064-65 (1st Cir. 1987); *Klein v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 758 F.2d 1511, 1514 (11th Cir. 1985). Despite that fact, the legislative history of the A.S.A, and the *Brother Jonathan* and *Captain Lawrence* cases, the Fourth Circuit's test has not only been cited, but also adopted outside the Fourth Circuit. *See Marex International v. The Unidentified, Wrecked and Abandoned Vessel*, 952 F. Supp. 825, 828 (S.D. Ga. 1997) ("The law of salvage applies to shipwrecks that have not been expressly abandoned by their owners."); *Zych v. The Unidentified, Wrecked, and Abandoned Vessel, believed to be the SB "Seabird"*, 811 F. Supp. 1300, 1309-11 (E.D. Ill. 1992, *aff'd*, 19 F.3d 1136 (7th Cir.), *cert. denied*, 115 S. Ct. 1994). The circuit case law in this area is conflicting and confusing, requiring resolution by the Court.

B. This is an Appropriate Case in Which to Resolve the Conflict and Provide Guidance on the Proper Test for Determining Whether a Sunken Merchant Vessel is Abandoned.

This case provides an appropriate vehicle for the Court to provide guidelines on the admiralty law standard of abandonment discussed above. The conflict among the circuits is plain, and it has been openly acknowledged by the Sixth and Ninth Circuits.

The issue presented by the petition is purely legal. The facts are not complex, and the outcome of the opinion below turns on the very question as to which a conflict exists.

Only this Court is capable of resolving the circuit conflict on this issue. This is consistent with the Court's constitutional responsibility of upholding the "principle that federal admiralty law should be a 'system of law coextensive with, and operating uniformly in, the whole country.'" *Miles v. Apex Marine Corp.*, 498 U.S. 19, 27 (1990) (quoting *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 401-402 (1970)). That uniformity is threatened by the conflict highlighted by the opinion below. A conflict among the admiralty courts is even more intolerable in the context of shipwreck recovery, where venue is proper in any district where the recovered property may be brought upon recovery, giving every incentive for forum shopping. *See* 28 U.S.C. § 1333 (1996); *Treasure Salvors, Inc. v. The Unidentified, Wrecked and Abandoned Sailing Vessel*, 640 F.2d 560, 567-68 (5th Cir. 1981). The Court should grant certiorari to resolve the conflict and provide guidance to the lower courts.

C. The Court Should Consolidate Consideration of this Case with *Deep Sea Research, Inc. v. The Brother Jonathan.*

The issue raised in Fairport International's petition is similar to an issue raised in the *Brother Jonathan* case mentioned above, which the Court recently agreed to hear. The facts in that case are also well-developed, the record is clear, and resolution of that case will turn on the question in Fairport International's petition. Consideration of this case in conjunction with the *Brother Jonathan* case will help sharpen the focus of these proceedings and serve the interest of consistency in clarifying the rule that should be applied by the federal circuits.

II. NEW ADVANCES IN MARINE TECHNOLOGY HAVE MULTIPLIED CONFLICTS OVER THE MARITIME TEST FOR ABANDONMENT, REQUIRING THIS COURT'S EXERCISE OF ITS CONSTITUTIONAL ROLE IN FASHIONING THE DEVELOPMENT OF MARITIME AND INTERNATIONAL LAW.

The Court's resolution of conflicts is especially important in admiralty matters. The issue raised here "is one of importance in the development of the law maritime, as to which [the Supreme Court] ha[s] large responsibilities, constitutionally conferred." *Southwestern Sugar & Molasses Co. v. River Terminals Corp.*, 360 U.S. 411, 415 (1959).

The divergence in the approaches of maritime courts in determining the proper test for determining whether a sunken merchant vessel is abandoned is plain.

See Edelman, *Who Gets Treasure Recovered From Sea?*, N.Y.L.J. Dec. 4, 1992, at 3, 4, (discussing change in law effected by Fourth Circuit and concluding that there is a need for resolution by the Court of "[w]hat proof is needed to show abandonment").

The development of new maritime technology has made a conflict among admiralty law doctrines inevitable. Moreover, with the development of ever-more sophisticated technologies for exploring the ocean, valuable items long thought hopelessly lost may be recovered, making the determination of presumptions regarding property interests and the test for abandonment issues of growing significance.

Although the Federal Government's public policy strongly encourages deep-sea exploration, such exploration is fraught with risks. Exploration of the seabed requires highly complex and sophisticated technology, and failures can occur at any stage of the exploration process. Enormous sums of venture capital are required if private enterprises, in addition to governments, are to have the opportunity to participate in such exploration. *See* U.S. Congress, Office of Technology, *Technologies for Underwater Archaeology and Maritime Preservation -- Background Paper*, OTA-BP-E-37, 8 (1987).

Under the inferred abandonment rule, the risks noted above are balanced against the certainty and predictability that, in appropriate circumstances, title will vest in an explorer who succeeds in locating and possessing ancient artifacts on the seabed. The express abandonment rule, however, provides an open invitation to highly speculative and fabricated claims. Under that rule, only after incurring the expense of bringing articles to the surface will deep-sea explorers know how much

risk, including the risk of an adverse claim to title, is involved. That risk is particularly acute as to historic shipwrecks, where much time between the loss and the recovery has often passed, substantial sums may be at stake, and no express abandonment has occurred. In the words of the Sixth Circuit, "such explicit action is obviously rare indeed." *Fairport International*, 105 F.3d at 1085. For this reason, the confusion created by the conflict among the circuits provides maritime explorers and entrepreneurs with an unfortunate disincentive to invest sufficient resources in deep-sea recovery projects.

The opportunities for scientific research and development with respect to long-lost and abandoned shipwrecks are tremendous. Such cultural deposits are unique laboratories, in many instances teeming with life forms and mysteries never before explored. But the "express abandonment" theory squanders opportunities for scientific research and development by making the financial incentives associated with technologically advanced discovery and recovery uncertain and unpredictable, thereby making it difficult, if not impossible, to attract the enormous sums of private venture risk capital needed for such challenging ventures.

Without predictable legal rights, discoverers will effectively be paralyzed and unable to attract the huge sums of capital required for these inherently risky ventures. *See* 30 U.S.C. § 1401(a)(13) (1994) (uncertainty in legal regime discourages private investment).

The conflict among the circuits over the standard for abandonment thus has important implications for the future ability of non-governmental institutions to participate in the benefits and innovations of high-tech exploration of the deep ocean.

III. ABSENT RESOLUTION BY THIS COURT, THE CONFLICT AMONG THE FEDERAL CIRCUITS WILL CONTINUE TO SPAWN CONFUSION IN FEDERAL-STATE JURISDICTION AND IN THE LAW GOVERNING THE PUBLIC ADMINISTRATION OF HISTORIC SHIPWRECKS.

The uncertainty over the maritime presumptions regarding property interests and abandonment that arises from the conflict among the federal circuits has important implications for the law governing the management of maritime resources by the Federal Government and the States. Technological advances have made access to shipwrecks easier, creating greater interest in them, but at the same time placing them at risk of destruction. *See* H.R. Rep. No. 514(I). Congress and the States have accordingly passed legislation aimed at protecting these historic resources. The federal-state jurisdictional conflict that inherently results from the rule applied in the Fourth Circuit, however, places the practicable administration of such legislation in doubt and makes conflicts of jurisdiction inevitable between federal and state courts.

As noted above, the major federal statute on point is the A.S.A. Under the A.S.A., the United States asserts title to "any abandoned shipwreck" that is on or embedded in the lands or coralline formations of a State, but transfers title of most such shipwrecks to the State on whose submerged land they are located. 43 U.S.C. § 2105. States are encouraged under the A.S.A. to take steps to protect abandoned shipwrecks for recreational and historical purposes. *Id.* at § 2104.

Under the rule in the Fourth Circuit, shipwrecks will rarely be deemed abandoned. Absent an express

abandonment, the ownership claim of anyone who appears to assert an interest is instead preserved, and the wreck is not considered abandoned, thus, in the words of the Sixth Circuit, "render[ing] the ASA a virtual nullity." *Fairport International*, 105 F.3d at 1085. Extending the "express abandonment" theory therefore has the potential of removing from the coverage of the A.S.A.'s protection any number of shipwrecks that would previously have been considered abandoned under traditional maritime and common law and that Congress clearly intended be covered when it relied on the traditional doctrine of inferred abandonment.

This split among the circuits thus has significant implications for the distribution of jurisdiction between state and federal courts and in the proper management of our sunken merchant vessels. The Court's attention to the issue is warranted now to avoid further confusion in this area.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

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